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IN THE

**SUPREME COURT OF THE  
UNITED STATES**

October Term, 1944.

**No. 380**

**CANADIAN RIVER GAS COMPANY, a Corporation,  
PETITIONER,**

v.

**FEDERAL POWER COMMISSION, CITY AND COUNTY  
OF DENVER, COLORADO, PUBLIC SERVICE COM-  
MISSION OF WYOMING, COLORADO-WYOMING  
GAS COMPANY, PUBLIC SERVICE COMPANY OF  
COLORADO, and COLORADO INTERSTATE GAS  
COMPANY, RESPONDENTS.**

**PETITION OF CANADIAN RIVER GAS COMPANY FOR  
REHEARING AND FOR ENLARGEMENT OF TIME  
FOR ISSUANCE OF MANDATE AND STAY OF MAN-  
DATE.**

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April 27, 1945.



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DATE.**

The judgment of this Court was entered herein on April 2, 1945, such judgment being an affirmance of the judgment of the Circuit Court of Appeals for the Tenth Circuit (142 F. 2d, 943).

Petitioner now petitions this Court to grant a rehearing herein, for the purpose of reconsidering the issues presented and the judgment entered and for enlargement of the time for issuance of mandate and stay of mandate until this petition for rehearing has been finally disposed of by the Court. In support of such petition, Petitioner respectfully shows as follows:

I.

*The Division of the Court*

The judgment of the lower court is affirmed in this case pursuant to an Opinion of the Court which was delivered by Mr. Justice Douglas on behalf of himself and three other Justices. In direct opposition to the Opinion of the Court is the dissenting opinion of Mr. Chief Justice Stone, in which he is joined by three other Justices. The affirmance of the lower court and the Commission's order, become effective only by reason of the concurring opinion of Mr. Justice Jackson.

II.

*The Grounds of This Petition*

Petitioner has reexamined and reviewed its argument before the Court in the light of the three opinions in the case, and has reached the conclusion that a reconsideration and reargument of the issues involved, particularly by reason of the views expressed and the position taken by Mr. Justice Jackson, might well lead the Court to arrive at a different conclusion. As shown hereinafter, this conclusion is founded upon the firm belief that Mr. Justice Jackson has unfortunately confused and intermingled the case of Petitioner with that of Colorado Interstate Gas Company, which, for convenience purposes, was included in the same Opinion of the Court; and that, as a result of such confusion, he has perforce, even though reluctantly, applied principles of law and reasoning which he would have not applied, but would have indited, had he understood the facts correctly and considered Petitioner's case individually upon its own merits. The conclusion to file this petition is further strengthened and supported by the knowledge that the Court is dealing here with the determination and settlement of far-reaching issues which are not only of critical importance to Petitioner but of immediate and vital concern to the public.

III.

*The Views and Position of Mr. Justice Jackson*

It would appear from the concurring opinion of Mr. Justice Jackson (1) that he finds himself unable to join

in the dissenting opinion because, according to his view, the Commission's order has no *immediate* "impact" upon production and gathering of gas and consequently the Commission has not imposed any direct regulation upon such activities; (2) that he finds himself likewise unable to join in the Opinion of the Court because he has heretofore dissented, and still vigorously dissents, against the end result and other theories upon which it is based; and (3) that he then concludes to concur in upholding the Commission's order because in his opinion (a) "The court cannot, consistently with *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, do otherwise," and (b) notwithstanding his desire to reverse the case, he believes "a reduction in the wholesale rates for resale to the public is in order." Each of the above propositions will be discussed herein-after in reverse order.

#### IV.

##### *The Reasonableness of Petitioner's Rates*

Apparently Mr. Justice Jackson was led to the finding that "a reduction in the wholesale rates for resale to the public is in order," so far as Petitioner is concerned, because of a seeming disparity between existing rates for regulated and unregulated gas. He points out that Colorado Interstate Gas Company (hereinafter called "Colorado Interstate") sells unregulated gas in large quantities to Colorado Fuel & Iron Company at Pueblo, Colorado, for various industrial uses at prices ranging from 9½¢ to 16¢ per MCF, whereas the same Company sells regulated gas at the Denver city gate for 40¢ per MCF.<sup>1</sup> No matter what

<sup>1</sup>While, as pointed out in the text, a comparison of Colorado Interstate's direct and resale rates has no pertinency to Canadian's situation and rates, it is submitted that, for reasons stated below the comparison of Colorado Interstate's rates, as made by Mr. Justice Jackson, is in itself erroneous.

During the year 1939 (the test year used by the Commission), the Commission found, as shown in Exhibit "A" to its Opinion and Order (R. V. 1, 181), that the average price for all gas delivered by Colorado Interstate to Public Service Company at Denver was 32 cents per MCF. Mr. Justice Jackson obviously overlooked reductions in the MCF price from 40 cents to 32 cents made prior to 1939.

Mr. Justice Jackson made a comparison between the rates charged the C. F. & I., which he stated to be 9½ cents per MCF for boiler gas and 16 cents per MCF for all other gas, and the rate being charged the Public Service Company at the Denver gate, which, as already pointed out, was

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weight this character of evidence may be given as to the justness and reasonableness of Colorado Interstate's rates for regulated gas; however, it leads nowhere when applied to the gas sales of Petitioner, because (a) Colorado Interstate and Petitioner are two different and separately owned entities, owning and operating different and separate properties; (b) the Commission has entered a separate and distinct rate reduction order against Petitioner; (c) the Commission has held, and this Court has affirmed, that Petitioner makes no sales of gas in interstate commerce which are not subject to regulation by the Commission, and therefore Petitioner has no unregulated sales, so far as the Commission is concerned, except sales for resale at the well and from the pipeline within the State of Texas; (d) Petitioner makes no sales of gas to Colorado Fuel & Iron Company or any other sales of similar character; and (e) all sales of Petitioner's gas to Colorado Interstate for all purposes are made at one and the same uniform price, i.e., actual cost as computed under the Cost Contract between the parties.

erroneously stated to be 40 cents per MCF instead of 32 cents, as found by the Commission. But a comparison of the rate charged the C. F. & I. with any rate hitherto charged the Public Service Company at Denver does not afford any test of the reasonableness of the rate ordered for the future, even as to Colorado Interstate.

Mr. Justice Jackson concluded that despite the obvious errors in the Commission's method, he would not vote to reverse the Commission's Order because the reduction did not appear to be unreasonable. The thing to be tested is the newly imposed rate, and that according to the Commission's own findings and Order, is now 15.4 cents per MCF. (R. V. 1, 181). Moreover, Denver is farther from the field by 105 miles; its gas is predominantly domestic and enjoys the highest priority on the pipe line facilities. Mr. Justice Jackson, while giving consideration to some economic factors justifying a difference in prices, failed, however, to give due weight to the important elements of load factor and priority and preference. We also point out in this connection that the 15.4-cent Denver rate ordered by the Commission, which is called the average cost per MCF, includes 6½% return.

It is, therefore, respectfully submitted that even as to Colorado Interstate, the reason assigned by Mr. Justice Jackson for not voting in favor of a reversal is based upon a misapprehension of the facts, and that he employed a wrong test in that he tested not the new rate, but the old.

This Cost Contract between Canadian and Colorado Interstate, dated January 3, 1928 (Ex. 16, R. V. 2, 711-780) has been designated by the Commission as "F.P.C. Rate Schedule No. 1" and it is the compensation under this Cost Contract which the Commission's Rate Reduction Order requires to be reduced by \$551,000 annually. This particular contract is unusual and is not the ordinary contract that courts or regulatory bodies are called upon to consider in rate regulation cases. In addition to requiring Canadian to currently sell and deliver to Colorado Interstate gas at

The record shows that for the year 1939, which was used by the Commission as the test year, Petitioner received from Colorado Interstate under the Cost Contract a price of approximately 5¢ per MCF for all gas produced, gathered, transported and then delivered to Colorado Interstate in New Mexico and Oklahoma, respectively. It is submitted that there is nothing in these facts or elsewhere in the record to indicate that a reduction is in order as to Petitioner's wholesale rates for resale to Colorado Interstate. The uncontested evidence in the record shows that the fair market value of Petitioner's gas in the Texas Panhandle Field arrived at through competitive arm's-length bargaining is 4¢ per MCF at the wellhead and 7¢ per MCF at Bivins Station, which is the end of gathering operations and the beginning of transmission operations (R., V. 6, 3256, 3280; Ex. 168, Sheets 113, 114; R., V. 6, 3281). It should be noted that whereas the reduction ordered by the Commission was \$2,065,000 in the case of Colorado Interstate, it was only \$561,000 in the case of Petitioner (R., V. 1, 188, 191). This Court could reverse Petitioner's case and still, on the basis of its judgment in the Colorado Interstate case, there would remain in effect a reduction in excess of \$1,500,000 for the customers of Colorado Interstate. A reduction even in this amount would result in a gate rate at Denver less than the 24¢ price computed by Mr. Justice Jack

Canadian's cost, the Contract obligates Canadian to acquire, maintain and develop a substantial block of gas leaseholds, to drill and operate wells, to construct and operate gathering facilities, to pay off Canadian's funded debt in fixed amounts at fixed times, and to sell gas to others only as permitted by Colorado Interstate; and finally, to receive from Colorado Interstate as compensation for the rendering of all of these services (including the purchase price of the gas actually purchased) only Canadian's actual net cost incurred in connection therewith. Canadian's cost under the Contract is computed by deducting all outside revenue received by Canadian (including sales of gas to others) from the aggregate cost of producing and delivering all gas sold to purchasers. This cost includes interest and amortization of funded and other indebtedness of Canadian, but does not include depreciation and depletion. Canadian's Cost Contract and the bond indenture securing its \$11,000,000 of 6½ Sinking Fund Bonds, payable June 1, 1948, (Ex. 22, R. V. 2, 656-685) are interrelated documents, with the Cost Contract pledged as part of the security under the bond indenture. Sinking fund obligations are in excess of \$600,000 annually which, together with interest, must be paid to prevent default.

As to total revenue received see Commission finding (R., V. 1, 187), and as to total volume delivered (14.65-pound pressure base) see Flow Map, Commission Exhibit 138. (R., V. 2, 1079.) Also Commission Exhibit 226. (R., V. 4, 2319.)

son on the basis of the charges made for gas to Colorado Fuel & Iron Company.

V.

*The Hope Case as a Precedent.*

A careful consideration of both the Opinion of the Court and the concurring opinion of Mr. Justice Jackson demonstrates that the impact and end result rule announced in the *Hope* case has been erroneously applied to a jurisdictional question.

Petitioner desires to point out these specific illustrations:

(1) The Opinion of the Court assumes that the production and gathering jurisdictional question was advanced by the State of West Virginia in the *Hope* case and was there rejected by the Court. That portion of the *Hope* opinion which discusses the position of West Virginia does not urge this point as a jurisdictional matter but argues solely the reduced valuation of Hope's leaseholds and wells and the effect thereof on the welfare and economy of the State. The holding of this Court was that Congress did not entrust to the Commission various considerations which the State of West Virginia advanced. A brief reference only was made to the production and gathering provision of Section 1(b) of the Act in Note 25 on page 614 of the *Hope* opinion, which dealt only with the valuation of the production plant. The jurisdictional question was not urged by the *Hope* company, was not included in the application for rehearing before the Commission, and could not have been presented for decision to this Court.

(2) The opinion of the Court in this case further assumes that the Commission, if prevented from including production and gathering properties in the rate base, nevertheless might arrive at the same dollar result acting within its jurisdictional limitations. It is stated that the inquiry then would be whether "the end result was unjust and unreasonable." The *Hope* case is the authority for this view which attempts to impose the end result test to non-jurisdictional action. The same argument might be made if the Commission had reduced the prices charged for sales made in intrastate commerce. The Court attempts to justify

non-jurisdictional action on the theory that no confiscation has resulted and so no complaint can be made. It is Petitioner's contention that it is the duty of the Commission to investigate and find out what is the proper commodity value or field price of gas, and this proposal in no way places any minimum value or return on production properties, except such as may in fact be found to exist.

(3). Basing his concurrence on the *Hope* case, Mr. Justice Jackson states that he cannot fairly find that the Commission has exceeded its authority in obtaining the evidence which bears on matters beyond the Commission's regulatory jurisdiction. He disagrees emphatically with the use made of such evidence and the results obtained therefrom, but says that the *Hope* case has decided that point. It is the failure of the Commission to take evidence of all the economic factors stated by Mr. Justice Jackson and its exclusion of all but the rate base method that is the gravamen of Petitioner's complaint. The statute rejects the rate base method for production and gathering property just as does Mr. Justice Jackson, and the *Hope* case does not touch upon this particular point of pricing gas in the field.

In describing the Commission's method of determining a just and reasonable price for Petitioner's gas in this case, Mr. Justice Jackson, among other things, typifies the method used as being "fantastic" and "little better than to draw figures out of a hat." For this and other reasons, he would like to reverse the case; and yet in the end he reluctantly concurs in upholding the Commission's order for the stated reason that "The Court cannot, consistently with *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, do otherwise." He relates that the *Hope* case introduced into judicial review of administrative action a philosophy that the end justifies the means, to which philosophy he dissented then and still dissents. Notwithstanding such dissents, however, he concludes, "But, it is the law of this Court, and I do not understand that any majority is ready to reconsider it."

The ultimate decision of this Court in the *Hope* case was reached on a 5-to-3 vote, and the Chief Justice joined in the

opinion of the Court. In this case the Chief Justice has written what we construe to be a vigorous dissenting opinion. In this dissenting opinion, he has pointed out that there was no issue raised by the parties in the *Hope* case as to the jurisdiction of the Commission over producing and gathering properties, and that the end result principles applied in the *Hope* case are wholly inapplicable to the issue presented in this case, for reasons which he states most forcefully. It may be that a majority of the Court is not ready at this time to abandon entirely the end result philosophy promulgated through the *Hope* decision; but at least one member of the minimum majority which concurred in that decision has shown not only his willingness but his determination to impose appropriate restrictions and limitations upon the application of that philosophy and to deny the freedom of a blank check to administrative agencies by reason thereof, when presented the opportunity to do so in a proper case.

Even though it be conceded that the "end result" legal philosophy announced in the *Hope* case represents the law of the land until reversed by this Court, nevertheless, we assume that no such "end result" can be applied in any case unless it is arrived at by methods and procedures which conform to other well recognized principles of law also announced by this Court.

In the case of *Colorado-Wyoming Gas Co. v. Federal Power Commission, et al.*, also decided on April 2, 1945, Mr. Justice Douglas, speaking for a unanimous court, states as follows:

"The review which Congress has provided for these rate orders is limited. Sec. 19(b) says that the 'finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.' But we must first know what the 'finding' is before we can give it that conclusive weight. We have repeatedly emphasized the need for clarity and completeness in the basic or essential findings on which administrative orders rest. *Florida v. United States*, 282 U. S. 194, 215; *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454, 464; *United States v. Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 504-505, 510-511; *United States v. Carolina Carriers Corp.*, 315 U. S. 475, 488-489. Their absence can only clog the administrative function and add to

the delays in rate-making. We cannot dispense with them for Congress has provided the standards for judicial review under this Act. See, 19(b). The courts cannot perform the function which Congress assigned to them in absence of adequate findings. Nor are they authorized under Section 19(b) to make findings and substitute them for those of the Commission."

Under the principles above stated, any Commission order to be tested under the "end result" theory must first pass the test of proper findings. Erroneous and improper findings would make the Commission's order just as defective as the absence of proper findings. Based upon the test year of 1939, the Commission does find or conclude in this case that the rates and charges of Petitioner subject to its jurisdiction are unjust, unreasonable and excessive to the extent of \$561,000 per year. (See Commission's Findings, R., V. I, 187) But the Commission arrives at this ultimate and critical finding or conclusion through preliminary findings and methods which Mr. Justice Jackson describes as being "fantastic," and which he says "vividly demonstrate the delirious results produced by the rate-base method" with respect to production and gathering properties. He further states that this case furnishes "another example of the capricious results of the rate-base method in this kind of case."

If, in order to be valid, an "end result" must be supported by proper findings, as it was held by this Court in the *Colorado-Wyoming Gas Company* case, then by what process of reasoning can the application of the "end result" theory in this case be upheld in any event when the ultimate finding or conclusion as to excessive rates is based upon findings, methods and results which are "fantastic," "delirious," "capricious," and "little better than to draw figures out of a hat"? Thus it would seem that a Justice might either agree or disagree with the "end result" legal philosophy of the *Hope* case and still find it wholly inapplicable or inappropriate here because of the lack of proper findings.

VI.

*Where the Hope Case Leads for Petitioner*

In reaffirming the views expressed by him in his dissenting opinion in the *Hope* case, Mr. Justice Jackson reiterates "that *Hope* provides no workable basis of judicial review, no key by which commissions can anticipate what rule, if any, will control our review, and no guidance to counsel as to what issues they should try or how they should try them." A more complete and devastating indictment of a rate regulatory concept would be difficult to frame. Notwithstanding his sweeping indictment and his sharp disagreement with the philosophy announced in the *Hope* case, however, he believes "that the majority which promulgated that decision, or a majority of that majority, should be permitted to spell out its application to specific problems *until we see where it leads.*" (Italics ours.) (p. 22)

This Court, or any individual member thereof, may find it desirable to bide time and to await the uncertain processes of trial and error in actual practice to appraise the results of the application of legal philosophies; both true and false; but most litigants, including this Petitioner, are not so fortunately situated. They must act today upon the judgment entered. They cannot delay until tomorrow on the premise that their own philosophies may be ultimately proven correct, and all will be well.

If the majority opinion in this case is to prevail, then it is a simple matter to spell out "where it leads" at once in so far as this Petitioner is concerned. Petitioner's properties, business and operations are covered entirely and exclusively by a Cost Contract with Colorado Interstate, wherein the cost of gas to Colorado Interstate is fixed as Petitioner's net actual cost after deducting revenues from all other sources. The Commission's order purports to change nothing in this Cost Contract, except its lifeblood, i.e., full reimbursement for costs incurred by Petitioner pursuant thereto. If Petitioner is to remain solvent then its income must at least equal its outgo. If Petitioner is to continue to drill wells and to produce, gather and transport natural gas, it must receive therefor sufficient funds to pay the cost thereof, as well as sufficient funds with which to meet installments of principal

and interest on its funded debt when due. If the Commission's rate reduction order is to stand, then Petitioner will receive less than its actual costs under the Cost Contract, and it must either seek some method of relieving itself from its obligations under the Cost Contract, or face bankruptcy or receivership forthwith.\*

Petitioner fully appreciates the necessity for, and the value of, trial and error experimentation for the purpose of exploring the vast unknown in any process of evolution, but as to this particular proposed trial Petitioner agrees first with the four Justices who joined in the dissenting opinion that the trial should not be had because of lack of jurisdiction, and second, Petitioner agrees with the conviction so ardently expressed by Mr. Justice Jackson that the trial is foredoomed to failure and disaster in any event, because the ultimate error is even now so flagrantly apparent. Since a majority of the Court believes either that the trial is improper and should not be had or that it is foredoomed to failure in any event, then why the trial? At best, the life of a guinea pig is a precarious existence even in well-conceived and properly administered experimentation. Such a trial in this case can benefit no one, and certainly it can be only of slight consolation to Petitioner to have it subsequently recorded in future legal or scientific annals that the operation was a success but the patient died as an end result.

## VII.

### *The Commission's Jurisdiction Over Production and Gathering*

On the question of the Commission's jurisdiction over production or gathering of natural gas, Mr. Justice Jackson states that "If the Commission had imposed any direct regulation upon that activity, I would join in holding it to have exceeded its jurisdiction. But the orders in question have no immediate 'impact' upon production or gathering of gas." It would seem unnecessary here to split hairs over fine distinctions between direct and indirect, or immediate and ultimate. For the purpose of showing that what the Commission has done with respect to production and gather-

\*See Petitioner's Brief on Petition for Certiorari, 19, 20, 40-42.

ing in this case is both immediate and ultimate, as well as direct and indirectly, it should be sufficient to review the record briefly, as follows:

(a) The Commission has assumed full and complete rate regulatory jurisdiction over Petitioner's production and gathering properties, facilities and business in precisely the same manner as it has exercised such jurisdiction over Petitioner's transmission properties, facilities and business, notwithstanding Section 1(b) of the Act;

(b) The Commission has set up a total rate base of which approximately two-thirds represents production and gathering properties even at the Commission's "fantastic" conception of gas leasehold values, and in so doing it has denied Petitioner actual cost, discovery, market and every other recognized yardstick of actual value for its gas leaseholds, except provable capital expenses of Petitioner and predecessor companies, commencing with the first "wildcat" or discovery well drilled over 25 years ago; (R., V. 1, 144-195; V. 5, 2717-2721)

(c) The Commission has determined and included in its rate base an allowance for working capital which it deems sufficient to enable Petitioner to carry on its production and gathering operations; and likewise the Commission has purported to determine in its rate base for production and gathering properties what additional wells should be drilled and what additional gathering facilities should be installed in the future; (R., V. 5, 2530-2556)

(d) The Commission has allowed a rate of return of 6½% per annum upon such "fantastic" rate base, more than two-thirds of which, as above stated, is attributable to the hazardous business of discovering, exploring, developing and operating natural gas production properties; (R., V. 1, 187)

(e) The Commission has purported to determine the annual amount which should be allowed to Petitioner in the future for the purpose of defraying its cost of producing and gathering natural gas; (R., V. 5, 2530-2556)

(f) The Commission's order purports to change and abrogate the amount of compensation which Petitioner is

entitled to receive from Colorado Interstate under its Cost Contract, which compensation represents cost reimbursement to Petitioner, not only for the cost of current deliveries of gas to Colorado Interstate, but for the cost of performing various other services under the contract relating exclusively to Petitioner's production and gathering properties and operations, such as acquisition and maintenance of leaseholds, the drilling of wells, and the construction of gathering facilities; (R., V. 2, 711-780) and

(g) The Commission's order, if permitted to stand without relief of some character, would enforce default upon Petitioner not only in its Cost Contract obligations, but its funded debt obligations, notwithstanding the fact that Petitioner is operating as a non-profit company and has not had, and will not have, any earnings or profits for distribution to its owners so long as the Cost Contract remains in effect.

As Mr. Justice Jackson suggests, this case "vividly demonstrates the delirious results produced by the rate-base method," or at least the Commission's conception of such method. Again, as Mr. Justice Jackson suggests, the method is "little better than to draw figures out of a hat," but in this instance the hat seemed to be loaded with low figures. If Section 1(b) of the Act were entirely eliminated so as to leave no express statutory cloud or prohibition whatsoever upon the full and complete jurisdiction of the Commission over producing and gathering, it could not have done in this case any more than it did do.

The Opinion of the Court concedes that Section 1(b) of the Act "precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like." We assume this statement means that in the Opinion of the Court the Commission has no power to compel Petitioner to drill, or not to drill, gas wells. It is respectfully submitted that the Court is misled and that the Commission does and will continue to have such power just so long as this Court will sustain the power of the Commission (a) to include gas wells in a rate-base at whatever valuation the Commission may determine, (b) to fix the amount of work-

ing capital which shall be allowed for the purpose of operating such wells, (c) to fix the rate of return which shall be applied against its valuation of such wells, and (d) to fix the amount of annual expense which shall be allowed for the purpose of operating such wells. The "impact" of the Commission's order upon Petitioner's producing and gathering properties, business and operations may not be "immediate," as stated by Mr. Justice Jackson, but at least it has the degree of immediacy suggested in the story of the man who fell out of the window on the thirtieth floor, and yelled that he was not hurt yet as he passed the thirteenth floor.

With respect to the Commission's rate regulatory jurisdiction over electric companies under the Federal Power Act, Mr. Justice Jackson has well said in his Opinion of the Court in the case of *The Connecticut Light & Power Co. v. Federal Power Commission*, decided March 26, 1945 (..... U. S. ....), that "whether the Act provides for such regulation depends upon whether the facilities are under the jurisdiction of the Commission; the Commission's jurisdiction does not depend on some independent application of the regulatory provisions." To reason otherwise, he states, would "get the cart before the horse." This Court appears to be of the unanimous view that Petitioner's production and gathering facilities are not subject to the jurisdiction of the Commission under the Act, and yet the independent application of the Commission's rate regulatory processes and provisions subjects them to the Commission's jurisdiction as completely and effectively as if the Section 1(b) of the Act conferred rather than denied such jurisdiction.

### VIII.

#### *Conclusion.*

The problems presented to Petitioner's management by the present judgment of this Court are not speculative or trivial. They are real and substantial. They gravely affect the immediate as well as the future existence of Petitioner's business. Primarily, Petitioner is engaged in the business of producing and gathering gas. From the standpoint of investment, revenues and expenses, it is only incidentally engaged in the business of transporting gas in interstate

commerce. In 1928, when Petitioner became a party to, and assumed its obligations for, the so-called Denver Project, it did so with the firm conviction that the Project should be protected and safeguarded against the vicissitudes of the future by the acquisition and maintenance of a gas reserve of sufficient size and dependability to cover all reasonable market requirements over a long period of years. This policy was believed to be in the best interests of the Project and the public which it served. If the Commission's order is to stand, this policy turns out to be an economic fallacy of serious magnitude to Petitioner.

As pointed out heretofore, the Opinion of the Court in this case concedes that Petitioner cannot be compelled by the Commission to drill wells and produce gas for pipeline purposes. Indeed, there is very little incentive so to do, when the same gas could be sold to others at the wellhead or in the field for approximately twice the price allowed therefor by the Commission. It would be far more profitable for Petitioner to dispose of its interstate transmission business, or to arrange to purchase gas from others for resale to Colorado Interstate. In the latter case, the full cost of such gas, if acquired at fair market values, would be alloyed by the Commission as an operating expense to Petitioner, unless the Commission should change its past practices in this respect. It is true that the consuming public on the Denver Project might lose the benefits and advantages of a large and dependable source of gas which they have been enjoying over a period of years at very moderate prices, but Petitioner would be able at least to remain solvent.

Petitioner, the natural gas industry, and its consuming public are all faced with innumerable and inevitable economic uncertainties in the future, including reconversion after the war. Certainly they should be spared the uncertainty of waiting until it may be seen where the legal philosophy of the *Hope* case will lead, if a majority of the Court believes that the legal philosophy announced there is either erroneous or not applicable here. If the end result theory promulgated in the *Hope* case is wholly bad, as Mr. Justice Jackson has so graphically described; then surely something is gained in any event, so far as the

natural gas industry and its consuming public are concerned, if the area within which such theory may be applied is reduced and restricted, and this is true notwithstanding the fact that a majority of the Court may not be ready at this time to abandon such theory entirely.

In conclusion, may the Petitioner be permitted once more to state the paradoxical question: If, as appears on the face of the judgment record, *a majority of this Court* believes that the legal philosophy underlying the Opinion of the Court is either wholly wrong or wholly inapplicable here, then why the application of such philosophy to Petitioner's case? Why should the legal philosophy of *a minority of the Court* be inflicted upon Petitioner, the natural gas industry or the consuming public as a sacrifice upon the altar of juridical experimentation, or otherwise?

WHEREFORE, Petitioner prays that a rehearing be granted herein for the purpose of reconsidering the issues presented and the judgment entered herein, and that the time for the issuance of mandate of the Court herein be enlarged by order of this Court, and the issuance of such mandate be stayed until such time as this petition for rehearing has been finally disposed of by the Court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, John P. Akolt, of the City and County of Denver, State of Colorado, being one of counsel for Canadian River Gas Company, Petitioner in the above petition named, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

JOHN P. AKOLT,

*Attorney for Petitioner,*

*Canadian River Gas Company.*